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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS MONTOYA,

Defendant and Appellant.

C070793

(Super. Ct. No. CRF113687)

Defendant Thomas Montoya pleaded no contest to possession for sale of a controlled substance and resisting an executive officer by means of threats, force, or violence; he also admitted two prior drug convictions. The trial court sentenced him to a stipulated aggregate term of nine years to be served in county jail. It awarded him 265 days of presentence custody credit, denying his request for day-for-day credit, and imposed various fines and fees.

Defendant contends (1) prospective application of the October 1, 2011 amendment to Penal Code section 4019¹ violates equal protection, and (2) the trial court's failure to award day-for-day presentence conduct credit pursuant to former section 2933, subdivision (e), violates the prohibition against ex post facto laws.

We conclude (1) the California Supreme Court recently indicated that prospective application of the October 1, 2011 amendment to section 4019 does not violate equal protection; and (2) the Attorney General agrees defendant should have received day-for-day presentence credit, and we do too. We will reverse the award of presentence credit and remand with directions to the trial court to award defendant the day-for-day credit to which he is entitled. We will otherwise affirm the judgment. We will also direct the trial court to correct an error on the abstract of judgment.

BACKGROUND

According to the factual basis for defendant's plea, a police officer contacted defendant while defendant was in his car. The officer saw a quantity of methamphetamine in defendant's lap, later determined to be approximately 16.6 grams. When the officer reached for the contraband, defendant shifted from park into drive and attempted to drive away while the officer was half in and half out of the car. The officer lost his balance and had to pull himself up and use force to stop defendant from continuing to drive.

Defendant pleaded no contest to possession for sale of a controlled substance (Health & Saf. Code, § 11378 -- count 1) and resisting an executive officer by means of threats, force, or violence (§ 69 -- count 3). He also admitted two prior drug convictions. Defendant agreed to a stipulated aggregate term of nine years (three years on count 1 plus three years consecutive for each prior conviction, with the sentence on count 3 to run

¹ Undesignated statutory references are to the Penal Code.

concurrent to count 1) with the understanding that another count and additional enhancements would be dismissed.

The trial court sentenced defendant to the stipulated nine-year term, to be served in county jail, and awarded him 265 days of presentence custody credit (177 actual days and 88 conduct days), denying defendant's request for day-for-day credit. The trial court orally imposed a \$200 restitution fine (§ 1202.4), an \$80 court security fee (§ 1465.8), a \$60 criminal conviction assessment (Gov. Code, § 70373), and a \$200 laboratory fee (Health & Saf. Code, § 11372.5).

DISCUSSION

I

Defendant contends prospective application of the October 1, 2011 amendment to section 4019, subdivision (h), violates equal protection. But the California Supreme Court recently indicated otherwise. (*People v. Brown* (2012) 54 Cal.4th 314, 330; see also *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Accordingly, we conclude the contention lacks merit. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II

Defendant next contends the trial court's failure to give him day-for-day presentence credit under former section 2933, subdivision (e), violated the rule against ex post facto laws. The Attorney General agrees that defendant should have received presentence credit pursuant to former section 2933, subdivision (e), and we do too.

Defendant committed his offenses on August 18, 2011. The version of section 2933, subdivision (e), in effect at the time of defendant's offenses authorized day-for-day conduct credit for defendants who were not statutorily disqualified from receiving such credits. The parties agree defendant was eligible for such credit under that provision. And section 4019, subdivision (h), now provides: "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."

We will reverse the award of presentence credit and remand with directions to the trial court to award defendant the day-for-day credit to which he is entitled.

III

In addition, we have identified an error in the abstract of judgment that requires correction. Among other things, the trial court orally imposed a \$200 laboratory fee pursuant to Health & Safety Code section 11372.5. But the abstract of judgment indicates that the fee was imposed pursuant to section 1202.5, which applies where a defendant is convicted of offenses under sections 211, 215, 459, 470, 484, 487, 488, and/or 594. (§ 1202.5, subd. (a).)

The trial court's oral imposition of the fee was correct. We will direct the trial court to correct the abstract of judgment to reflect its oral imposition of the \$200 laboratory fee pursuant to Health & Safety Code section 11372.5.

DISPOSITION

The award of presentence credit is reversed and the matter is remanded to the trial court with directions to award defendant the day-for-day credit to which he is entitled. The judgment is otherwise affirmed. After the trial court awards the appropriate presentence credit it is directed to amend the abstract of judgment to reflect the appropriate credit, and it is further directed to correct the abstract of judgment to reflect its oral imposition of the \$200 laboratory fee pursuant to Health & Safety Code section

11372.5. The trial court shall forward a certified copy of the amended and corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

RAYE, P. J.

MURRAY, J.